Litigation Section of The State Bar of California

Litigation Update

Litigation Section News

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Mandatory Fee Arbitration Act may preclude binding arbitration. The Mandatory Fee Arbitration Act ("MFAA") (*Bus. & Prof. Code* §6200 ff.), entitles clients to nonbinding arbitration and trial de novo in fee disputes. In *Schatz v. Allen, Matkins, Leck, Gamble, & Mallory, LLP* (Cal. App. Fourth Dist., Div. 1; January 9, 2007) 146 Cal.App.4th 674, [53 Cal.Rptr.3d 173, 2007 DJDAR 407] the Court of Appeal held that the MFAA supersedes a mandatory arbitration provision in an attorney retainer contract. If the client elects nonbinding arbitration under the act and is dissatisfied with the result, he or she is entitled to a court trial even if the retainer agreement provided for binding arbitration.

The appellate court relied on a similar holding in *Alternative Systems, Inc. v. Cary* (1998) 67 Cal.App.4th 1034, [79 Cal.Rptr.2d 567]. The *Schatz court* disagreed with a concurring opinion written by Justice Chin in *Aguilar v. Lerner* (2004) 32 Cal.4th 974, [12 Cal.Rptr.3d 287], wherein Justice Chin concluded that the latter case overruled *Alternative Systems*. In view of this conflict, we would not be surprised if the Supreme Court grants review in *Schatz*.

Charter schools are not subject to claim requirements. The Government Tort Claims Act (*Gov. Code* §900 ff.) imposes a claim filing procedure that must precede the filing of an action against a public entities. (*See*, Weil & Brown, *California Practice Guide, Civil Procedure Before Trial* (The Rutter Group) §§1:646 ff.) *Knapp v. Palisades Charter High School* (Cal. App. Second Dist., Div. 7; January 10, 2007; As modified Jan. 30 & Feb. 5, 2007) 146 Cal.App.4th 708, [53 Cal.Rptr.3d 182, 2007 DJDAR 489] held that a charter school, incorporated as a nonprofit public benefit corporation, is not a public entity even though it was chartered by a public school district. Therefore plaintiff's failure to comply with the claims procedure did not bar the action.

If you undertake to manage a boxer, be sure you have a license. Under the California Boxing Act (*Bus. & Prof. Code* §1860 ff.) boxing managers and boxers are required to have written contracts. Managers must also be licensed by the State Athletic Commission. After plaintiff negotiated a boxing contract for Marco Barrera, the latter reneged on his promise to compensate plaintiff. Plaintiff was out of luck and out of the money. The Court of Appeal held that, in the absence of a license and a written contract, plaintiff was not entitled to be compensated. *Castillo v. Barrera* (Cal. App. Second Dist., Div. 5; January 22, 2007) 146 Cal.App.4th 1317, [53 Cal.Rptr.3d 494, 2007 DJDAR 965].

Purported class action representative, not a member of the class, not entitled to discovery to find a new plaintiff. *Best Buy Stores v. Sup.Ct. (Boling)* (2006) 137 Cal.App.4th 772, [40 Cal.Rptr.3d 575, 2006 DJDAR 3059] held that where a class action plaintiff became disqualified after the suit was filed, he was entitled to pre-certification discovery in an attempt to find a substitute class representative. But the same rule does not apply where the class action plaintiff never qualified as a member of the purported class in the first place. In *First American Title Ins. Co. v. Sup.Ct. (Sjobring)* (Cal. App. Second Dist., Div. 3; January 25, 2007) 146 Cal.App.4th 1564, [2007 DJDAR 1210], the Court of Appeal concluded that to permit such discovery would constitute "an abuse of the class action procedure."

Privacy interests of customers do not preclude discovery in class action. In a consumer rights action based on the alleged sale of defective DVD players, plaintiff sought to discover the identity of purchasers who had complained about such defects. The California Supreme Court affirmed a decision of the trial court ordering such disclosure. The court concluded that the privacy rights of customers who lodged complaints would not be violated by the disclosure. *Pioneer Electronics (USA), Inc. v. Sup.Ct. (Olmstead)* (Cal.Supr.Ct.; January 25, 2007) 40 Cal.4th 360, [2007 DJDAR 1187].

Statute of limitations does not preclude recovery for continuous abuse. Michele Pugliese allegedly was the victim of domestic violence over many years. When she sued her abuser, the trial court ruled that she could only recover for abuse that occurred within three years before the filing of her complaint, the applicable statute of limitations period. Not so, stated the Court of Appeal. In *Pugliese v.*

Evaluation of New Civil Jury Instructions:

The Jury Instruction Committee is actively involved in reviewing, and recommending changes to, the new California Civil Jury Instructions. VerdictSearch, a division of American Lawyers Media, is assisting in the solicitation of input and feedback from practicing attorneys who have recently tried cases in California.

If you are interested in reporting on a recent trial in California and providing your feedback on the new CACI jury instructions, click here.

Sup.Ct. (Pugliese) (Cal. App. Second Dist., Div. 3; January 23, 2007) 146 Cal.App.4th 1444, [2007 DJDAR 1079], the court held that Ms. Pugliese was entitled to recover for the entire period of the continuous abuse.

Statute of limitations for medical malpractice may be extended. *Code Civ. Proc.* §364 provides that, before an action for negligence may be filed against a health care provider, plaintiff must first give 90-day notice. If such a notice is served within 90 days of the running of the statute of limitations, the limitation period is extended for 90 days from the service of the notice. *Jones v. Catholic Healthcare West* (Cal. App. Third Dist.; January 31, 2007) 147 Cal.App.4th 300, [2007 DJDAR 1398].

Dismissal for failure to bring case to trial reversed where delay due to illnesses. *Code Civ. Proc.* §§583.310 and 583.340(c) require the dismissal of a case if not brought to trial within 5 years from filing, unless doing so would be impossible, impracticable, or futile. In *Tamburina v. Combined Insurance Co. of America* (Cal. App. Third Dist.; January 31, 2007) 147 Cal.App.4th 323, [2007 DJDAR 1475] the trial court dismissed the action under the statute. But the Court of Appeal held that, where the delays in bringing the case to trial resulted from plaintiff's and his attorney's illnesses, it would have been impracticable to bring the case to trial and reversed the judgment of dismissal.

New Bill Addresses California Sentencing Law: The Administrative Office of the Court announced that, in light of the U.S. Supreme Court decision in *Cunningham v. California* (January 22, 2007) 127 S.Ct. 856, which found that a jury, not a judge, must find beyond a reasonable doubt any aggravating factors other than a prior conviction that are required to impose an upper-term sentence, the California Legislature is considering revisions to the current sentencing scheme.

Senate Bill 40, as amended on January 25, 2007, would place the decision whether to impose the lower, middle, or upper term solely within the discretion of the court. The bill passed out of the Senate Public Safety Committee last week and has been referred to the Senate Appropriations Committee.

As to judicial branch action, some California appellate courts have adopted standing orders regarding appellate procedures for post-*Cunningham* challenges to upper-term sentences. In addition, the Judicial Council's Criminal Law Advisory Committee will be meeting to discuss how the California Rules of Court will need to be amended to address the decision and any legislative changes to the statutory scheme that may be enacted.

Code Civ. Proc. §998 does not apply to FELA actions. *Code Civ. Proc.* §998 provides, among other things, for the recovery of expert witness fees where a party who previously rejected an offer to compromise made under the statute, obtains a less favorable result after trial. (*See*, Weil & Brown, *Civil Procedure Before Trial* (The Rutter Group) ¶¶ 12:590 ff.) But the statute cannot be applied in an action under the Federal Employer's Liability Act (45 U.S.C. §51 ff.) Even though the action was tried in state court, federal law controls. *See*, *Miller v. Union Pacific Railroad Co.* (Cal. App. Third Dist.; February 1, 2007) 147 Cal.App.4th 451, [2007 DJDAR 1549].

Judicial disqualification claim usually not available on appeal. The general rule is that failure to file a timely writ petition precludes a subsequent appeal based on a claim that the judge should have disqualified him or herself. But there is an exception when the disqualification claim implicates constitutional due process rights. *People v. Freeman* (Cal. App. Fourth Dist., Div. 1; February 5, 2007) (Case No.: D046394, D048111, D049238) [2007 DJDAR 1714].